UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Administrative Law Judges
San Francisco, California

SODEXO AMERICA LLC

and Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND
USC UNIVERSITY HOSPITAL

and Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and Cases 21-CA-39328
21-CA-39403

NATIONAL UNION OF HEALTHCARE
WORKERS

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

These cases present the legal issue of whether an off-duty employee access rule, maintained and enforced by Respondent-USC University Hospital ("Respondent-Hospital"), and its food service provider, Respondent-Sodexo America ("Respondent-Sodexo")[1], is unlawful because it does not prohibit access for "any purpose" as required by the third prong of Tri-County

[1] Where applicable, Respondent-Hospital and Respondent-Sodexo are referred to collectively herein as "Respondents."

Medical Center, 222 NLRB 1089 (1976).[2] Also at issue here is the legality of resultant discipline of four workers who disobeyed that rule for the purpose of engaging in non-disruptive Section 7 activity.

Respondents' off-duty employee access rule ("the Rule") provides:

> Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any work area outside the Hospital except to visit a patient, receive medical treatment, or to conduct hospital-related business. . . Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management. (GCX 5).

I. FACTUAL BACKGROUND

The Rule was initially implemented in 1991 by a predecessor employer.[3] (GCX 3). Respondent-Hospital purchased the hospital on April 1, 2009, and has continued to maintain and enforce the Rule; its only change to the Rule was the contact information for enforcement purposes. (TR 30:1-13). In turn, Respondent-Sodexo announced the Rule to its employees sometime after May 6, 2009, and within the Section 10(b) period, and displayed the Rule on a bulletin board during the same applicable period. (GCX 2).

On May 5, 2010, Respondent Hospital suspended and threatened to arrest alleged discriminatee Michael Torres for violating the Rule, and demoted him one week later. (GCX 3). On May 6, 2010, the Board conducted a representation election at the hospital. (GCX 4). On

[2] Prior to the close of hearing, the Administrative Law Judge ("ALJ") suggested that the brief of Counsel for the Acting General Counsel ("GC") address areas of concern beyond the Board's three prong test of Tri-County. Specifically, the ALJ requested discussion of any extant Board policy or law that would require Respondents to rescind the current exceptions to their off-duty employee access rule, in favor of a blanket prohibition of all employee access to the hospital. (TR 85).

[3] Preliminarily, GC notes that the government's case-in-chief was limited to two stipulations of fact, one with Respondent-Sodexo (GCX 2), and another with Respondent-Hospital (GCX 3).

June 25, 2010, Respondent-Hospital disciplined the three additionally alleged discriminatees, Ruben Duran, Alex Corea and Noemi Aguirre, for violating the Rule. (GCX 3).

At the hearing, pursuant to the ALJ's request, Respondent-Hospital presented a single witness in an effort to establish business justifications for the Rule. The witness, Matthew F. McElrath, has been chief of human resources since August 2009. (TR 28, 53). Mr. McElrath spends only about 50 percent of his time actually in the hospital, largely in conference room meetings or one-on-one meetings with various leaders. (TR 59:1-7). Testifying that the Rule was in place before he started working for Respondent-Hospital, Mr. McElrath nevertheless propounded several reasons for its necessity: first, he addressed the security of the building itself. (TR 31:7). In this regard, the hospital has two primary visitor entrances, adjacent to both of which are staffed desks where patients or visitors sign in. (TR 32:4-9). According to Mr. McElrath, the procedure for an off-duty employee who comes to the hospital for treatment or patient-visits is identical to the procedure for the general population: he or she is expected to sign in at the desk for admittance or to receive a visitor's badge. (TR 37:5-11; 41:10-17). As such, Mr. McElrath testified that an off-duty employee who comes to visit a patient would receive a visitor badge and be expected to stay in *public areas*. (TR 41:23-25) (Emphasis supplied.) But, he did not address how employees would be aware, or that they were aware, of such procedures given the absence of procedural language from the Rule's exceptions.

According to Mr. McElrath, the hospital has multiple entries from the outdoors that are kept locked, but can be opened with an employee-badge at any time. (TR 32:10-25). Mr. McElrath did not know which specific offices or areas, if any, employees could access with their common-area badges. (TR 33:18-24). His main point was that, by using their badges, employees could gain access to the building through the locked outer doors, and there would be no way to differentiate whether they were there to work or not. (TR 33:6-15). Acknowledging

that many of the hospital's inner work areas or offices had specifically coded access controls, Mr. McElrath nonetheless opined that, since respiratory therapists and patient care technicians assist patients in their rooms, they could wander throughout the hospital; and the same could hold true for environmental services employees because they clean the entire hospital. (TR 34; 35:3-5).

Furthermore, according to Mr. McElrath, Respondent-Hospital's responsibilities under the Health Insurance Portability and Accountability Act ("HIPAA") lend yet another justification for the Rule, and also have some obscure connection to employee access to, and behavior in, the cafeteria. (TR 43:11-25; 44:1-15; 46:19-25; 47:1).

Julio Estrada has worked at the hospital for 17 years—ten of which he has been a lead respiratory therapist. (TR 70:22-23; 71:6-7). He is not employed by Sodexo, but is a member of the bargaining unit presently represented by NUHW. (TR 71:8-24). He works three days per week; is paid bi-weekly and does not have direct deposit. (TR 72). So he comes to the hospital to pick up his payroll check often on his off-day using his badge,[4] as everyone else does who needs to pick up his payroll check when off-duty. (TR 76:7-20).[5] In fact, Mr. Estrada testified that his supervisor, Victor Perez, has observed him come to pick up his check while off-duty on more that ten occasions, and never told him that he should not be in the hospital. (TR 81). On such occasions, Mr. Perez clearly knows that Mr. Estrada is off-duty because Perez makes the schedules. (TR 83).

III. ARGUMENT

The Board analyzes rules governing the access rights of off-duty employees to an employer's facility under the three prong test articulated in Tri-County Medical Center, 222

[4] Mr. Estrada testified that about 80 percent of the time he picks up his check while off duty. (TR 79:6-12).
[5] Page 76 line 21 of the official transcript states that GC objects; however, this is a transcription error that should be corrected: it was Ms. Deacon who objected.

NLRB 1089 (1976). There, the Board held that a rule prohibiting access to off-duty employees would be valid only if it: 1) limits access solely with respect to the interior of the plant and other working areas; 2) is clearly disseminated to all employees; and 3) applies to off-duty employees seeking access to the plant for any purpose, and not just those employees engaging in union activity.

A. The Rule Does Not Limit Off-Duty Employee Access for Any Purpose Therefore It's Invalid under Tri-County

In Baptist Memorial Hospital, 229 NLRB 45 (1977), enfd. Baptist Memorial Hospital v. NLRB, 568 F.2d 1 (6th Cir. 1977), the employer maintained a prohibition on the distribution of union literature during non-working hours on or near the hospital's premises. The Board, noted the ALJ's reliance on the Tri-County test and, in support of the ALJ's finding of a violation, reiterated the fact that the employer permitted access to employees for certain purposes, including visiting patients and picking up pay checks. Id. at 45 fn. 4. Moreover, in Intercommunity Hospital, 255 NLRB 468 (1981), the Board found the employer's no access rule invalid under Tri-County because it prohibited off-duty employee access, except when employees were visiting friends or relatives, who were patients or on official business with the hospital. The rule on its face did not prohibit access for all purposes. Id. at 474.

Here, as in both Baptist Memorial Hospital and Intercommunity Hospital, the Rule allows off-duty employees access to visit patients (any patient not just family and friends). And, almost identical to the rule in Intercommunity Hospital regarding "official business with the hospital," the Rule allows off-duty employees access "to conduct hospital related business." In addition, as was the case in Baptist Memorial Hospital, record testimony in the instant case establishes that Respondent-Hospital does not prohibit off-duty workers access to pick up their pay checks.

In accord with the above principles, the instant Rule is unlawful because it suffers from either one or both of the above defects. First, the Rule effectively requires employees to obtain authorization from Respondents by permitting access for hospital-related activities that are "specifically directed by management."[6] Second, the Rule carves out lists of exceptions to the prohibition against off-duty employee access for employees who are visiting patients or receiving medical treatment.[7] Thus, as in Baptist Memorial Hospital and Intercommunity Hospital, the instant Rule is invalid because it does not prohibit access for "any purpose."[8]

The Board's decision in Southdown Care Center, 308 NLRB 225 (1992) does not reverse the Baptist Memorial Hospital line of cases. In Southdown, the judge found, inter alia, that the employer unlawfully interrogated employees and created the impression of surveillance, and dismissed allegations that the employer unlawfully threatened and disciplined employees. The Board, in its decision, addressed only these Section 8(a)(1) and 8(a)(3) allegations. There, the judge also dismissed, without discussion, an allegation that an employer access rule violated Tri-County. In Southdown, the rule prohibited off-duty employee access to the interior of the facility, but stated that employees who had friends or family in the home were permitted to "visit them during their off hours but must follow visitor rules." The Board, in its decision, never raised or discussed the access rule, and it is not clear that the General Counsel excepted to the judge's dismissal of that allegation. Under such circumstances, it would be in error to view Southdown as a reversal of Baptist Memorial Hospital, particularly since there neither the Board, nor the judge mentioned Baptist Memorial Hospital or Intercommunity Hospital, let alone

---

[6] See Intercommunity Hospital, 255 NLRB at 474.

[7] See Intercommunity Hospital, 255 NLRB at 474; Baptist Memorial Hospital, 229 NLRB at 45, n. 4.

[8] Two ALJDs pertaining to off-duty employee access rules, Garfield Medical Center, 2002 WL 31402769 and San Ramon Regional Medical Center, Inc., 2003 WL 22763700, to which no party filed exceptions, do not and should not constitute binding precedent.

questioned their continued applicability for analyzing the third prong of Tri-County. In any event, GC notes that the rule in Southdown was more akin to an exclusion for all purposes under the third prong, in that it prohibited off-duty employee access, only allowing employees who wished to visit friends or family residing in the home the opportunity to do so subject to the same rules established for access by the general public. Contrariwise, on its face, the instant Rule does not provide for such precise procedures. Inasmuch as this case concerns a facial challenge to the Rule, its lack of precision and clear direction to workers is of utmost importance. McElrath's testimony alone is surely insufficient to transmogrify an otherwise facially invalid rule. In this regard, Respondents offered no evidence to establish that their employees were aware of any unwritten procedures concerning the Rule.

B. Respondents' Business Justifications Do Not Warrant a Different Result

As stated above Mr. McElrath testified to several purported business justifications for the Rule, each of which constitutes an inadequate response to the statutory concerns of the instant matter as articulated in Tri-County. Moreover, when considered cumulatively such justifications constitute a clear stretch and are truly suspect. Just because Respondent-Hospital is in the business of providing healthcare to the public does not make it untouchable, sacrosanct or exempt it from allowing its employees to engage in Section 7 activities. See, Sheet Metal Workers Local 15 v. NLRB (Brandon Regional Medical Center), 491 F.3d 429 (D.C. Cir. 2007).

For example, other than testifying to the obvious—that when employees are on-duty they are subject to supervision—Respondent-Hospital's witness failed to articulate any correlation between its responsibilities under HIPAA and the necessity for the Rule as written. Moreover, common sense dictates that it would be far easier for an on-duty employee to obtain

confidential patient information than for an off-duty employee, already subject to increased scrutiny, to do so.

Similarly, Respondent-Hospital's contention that its Rule prevents workplace violence is without merit, for arguably, an off-duty employee visiting a patient (permissible under the Rule) would be more distressed and susceptible to violent out burst than an off-duty employee sitting in the cafeteria with his co-workers, during their lunch break, discussing the upcoming representation election (impermissible under the Rule).

According to Respondent-Hospital, its HIPAA and workplace violence concerns, as they pertain to off-duty employee access, conjoin in the cafeteria. In support of this position, Mr. McElrath testified preposterously that on-duty staff is more aware of the need to maintain confidentiality of medical records while in the cafeteria. In addition, he described how a 2010 risk assessment recommendation resulted in the hospital's decision to close its cafeteria to the broader public; however, it remains open to patients, visitors, outside vendors and staff.[9] Therefore, off-duty employees, permissibly on the premises pursuant to one of the Rule's exceptions, would undeniably have access to the cafeteria. Respondent-Sodexo takes us deeper into this Alice-in-Wonderland universe by contending that since its employees work in the cafeteria, the entire cafeteria, wall-to-wall, is a working area for Sodexo workers—including the tables at which they take breaks or eat meals.

In sum, Respondents' justifications for the Rule, as written, do not warrant a different approach from the Board's analysis in Tri-County. Indeed any suggestion or contention that adherence to the third prong of Tri-County places them in jeopardy of violating federal laws and public policy must be rejected. Respondents are still free to open the hospital and its

[9] This change in Respondents' access policy coincided with the approximate time of the NUHW organizing campaigns and representation elections. (RX 2).

facilities to the extent warranted by public policy or mandated by statute. Tri-County merely requires that, if they do so, they must also open their doors to off-duty employees seeking access to engage in protected Section 7 activity.

C. GC Seeks Access that Comports with Section 7 Considerations

GC's objective is not to impede employees' ability to receive medical treatment or visit patients; concomitantly GC does not seek to interfere with Respondents' ability to staff or run their businesses. GC's interest is to permit employees to exercise their Section 7 rights without the threat of arrest or the penalty of demotion or more punitive discipline.

Similar to the circumstances of Baptist Memorial Hospital, here Respondent-Hospital does not prohibit off-duty access for any purpose, or even limit its exceptions to those on the face of the Rule. In this regard, it is uncontested that off-duty employees may return to the hospital to pick up their payroll checks. Such exceptions demonstrate the ad hoc or discretionary nature of the Rule, and how it can be easily manipulated for Respondents' particular purposes, and to stymie Section 7 activity, which of course is contrary to the purposes of the NLRA and public policy. Additionally, the Rule's exception permitting off-duty employee access for "hospital related business," is exceedingly vague and particularly troubling since it allows Respondents to finesse unilaterally employees' access rights. For example, a retirement potluck might be considered "hospital related business," whereas a potluck to encourage support for the union, would be off-limits.

As such, GC maintains that the Rule violates the law as set forth in Tri-County, and public policy because it selectively infringes on employees' Section 7 rights. The Board's decision in Tri-County reflects an effort to limit or contain such destructive effects. While GC does not propose any specific revision to the Rule, it is clear, nonetheless, that just as Respondent-Hospital is able to police its current exceptions pertaining to off-duty employee

access, so, too, it could police employees who come on its premises to engage in Section 7 conduct, and it would still be able to accomplish its goals, including those involving safety and security.

In substance, the Rule denies access to the hospital to all off-duty employees, and prohibits workers who are going off-duty from remaining on the premises unless they fall within one of the Rule's exceptions or a supervisor does not object—all of which is subject to Respondents' sole control. In this subtle but unlawful fashion, the Rule thwarts the right of employees to communicate with each other, about self-organization or conditions of employment, while on the hospital's premises—the mostly likely place for Respondents' workers to engage in such discussions during non-work time. Further, and more important, by defining an off-duty employee "as an employee who has completed his/her assigned shift," the Rule renders it difficult, if not impossible, for any discussion before or after work between employees in a particular shift as the Rule appears to limit the employees' presence at the hospital to the brief time necessary to prepare for or leave work. In sum, the Rule is unlawful because it is imprecise and amenable to abuse.

D. Respondent-Hospital Violated the Act by Demoting and Threatening to Arrest Michael Torres and Disciplining Aguirre, Corea, and Duran

Respondent-Hospital stipulated that Michael Torres' violation of the Rule was a precipitating event for his suspension and demotion. It further stipulated that Torres was threatened with arrest if he did not leave the hospital's premises. Finally, Respondent-Hospital stipulated that employees Ruben Duran, Alex Corea and Noemi Aguirre received verbal warnings for violating the Rule. Inasmuch as the Rule is facially invalid, the adverse action taken by Respondent-Hospital against the four discriminatees is unlawful too.

CONCLUSION

In light of the above and the record as a whole, General Counsel requests that the Administrative Law Judge find that Respondents violated the National Labor Relations Act as alleged in the Consolidated Complaint and issue an appropriate remedial order.

Dated: 28 March 2011

Respectfully submitted,

Alice J. Garfield
Counsel for the Acting General Counsel
National Labor Relations Board, Region 21
888 S. Figueroa St., 9th Floor
Los Angeles, CA 90017

STATEMENT OF SERVICE

I hereby certify that a copy of General Counsel's Brief to the Administrative Law Judge was submitted by E-filing to the NLRB's Division of Judges, San Francisco, California on March 28, 2011. The following parties were served with a copy of the same document by electronic mail.

Lester F. Aponte, Attorney at Law
Bate, Peterson, Deacon, Zinn & Young, LLP
laponte@bpdzylaw.com

Mark T. Bennett, Attorney at Law
Marks, Golia & Finch, LLP
mbennett@mgfllp.com

Florice O. Hoffman, Attorney at Law
Offices of Florice Hoffman
fhoffman@socal.rr.com

Bruce A. Harland, Attorney at Law
Weinberg, Roger & Rosenfeld
BHarland@unioncounsel.net

Ms. Patricia Ortega
opatricia491@gmail.com

Dated at Los Angeles, California,
this 28th day of March 2011

Alice J. Garfield
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21